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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1035

JULIA ROGERS,

Petitioner,

v.

**LEROY LOETHER and MARIANE LOETHER, his wife,
and MRS. ANTHONY PEREZ**

**REPLY BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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The "Question Presented" by the petition for a writ of certiorari is whether a jury trial is required in actions for injunctive relief and punitive damages under the fair housing law. Respondents' memorandum opposing certiorari contends the question is incomplete because it fails to include actual damages. The issue raised by respondents is hardly responsive to the central issues in this case. Nevertheless, we submit the question of actual damages is "fairly comprised" by the question presented within the meaning of Rule 23(1)(c) of this Court.

The presentation of the actual damage issue in the district court should be restated in the interest of clarity:

(1) The complaint requested injunctive relief and punitive, but not actual, damages. As respondents note, the complaint did in standard fashion request "that the Court grant whatever other and further relief it may deem just

and proper." However, in light of Rule 9(g) of the Federal Rules of Civil Procedure which requires a specific statement of special damages, it is doubtful that such boiler plate language by itself adequately pleads a claim for actual damages.

(2) Petitioner discussed actual damages in pretrial proceedings, and in a pretrial order on February 10, 1970 the district court ruled that the question of actual damages should be tried.

(3) When the district court denied respondents' demand for a jury trial on May 19, 1970, it did so on the assumption that a claim for actual damages was as much a part of the case as a claim for punitive damages.

(4) Respondents elected not to petition the court of appeals for a writ of mandamus to require a jury trial, although mandamus is clearly available to correct an improper denial of a jury demand. *Beacon Theatres v. Westover*, 359 U.S. 500, 511. Instead, respondents chose to proceed through a trial to a final judgment.

(5) The district court entered pretrial orders, on May 7 and July 6, 1970, requiring petitioner to file an itemized statement of special or actual damages, but no statement was filed.

(6) On the first day of the trial, the parties met with the district judge in chambers. Respondents raised the question of petitioner's failure to file an itemized statement of actual damages. The district court stated, and respondents concurred, that the case had "narrowed down to punitive damages."¹ The court indicated that when the trial commenced either side could object to testimony and offers of proof could be made for the record if the

¹ Trial transcript, October 26, 1970, p. 5.

court sustained any objections.² As soon as petitioner sought to testify about an item of actual damages, respondents objected and the district court sustained the objection.³ The court allowed an offer of proof in question and answer form pursuant to Rule 43 of the Federal Rules of Civil Procedure, and petitioner proceeded on that basis.⁴ The effect of the court's ruling was to exclude testimony of actual damages from the district court's consideration but to allow petitioner to develop a record for use on appeal. Petitioner did not appeal the exclusion of evidence of actual damages.

(7) At the conclusion of the trial, the district court awarded punitive but not actual damages.

Petitioner framed the "Question Presented" in accordance with the court of appeals' view that the right to a jury trial should be determined by the relief requested in the complaint (25a). Specific reference to actual damages was also omitted because the final judgment of the district court from which respondents appealed was limited to punitive damages. Nevertheless, to the extent that actual damages may or ought to be considered in resolving the issue here presented, the actual damage issue is "fairly comprised" within the question presented. The language of the statute furnishes no basis for distinguishing actual and punitive damages for the purpose of determining whether there is a right to trial by jury. Section 812(c) provides "the court . . . may award to the plaintiff actual damages and not more than \$1000 punitive damages" Under the statute, if a jury is required for the award of one type of damages it would seem to be required for both. Similarly, if a jury is not required for an award

² *Id.*, at 7.

³ *Id.*, at 17-18.

⁴ *Id.*, at 18.

of one kind of damages, then it would seem not to be required for either. Additionally, the threshold constitutional problem is the same whether actual or punitive damages are sought: is an action to enforce Title VIII in the nature of a suit at common law? Petitioner's argument that the right to fair housing is unrelated to the common law applies whether the remedy to a denial of the right involves actual or punitive damages, or both.

In one short section of the petition we focus on special considerations concerning the award of punitive damages, but in the main the petition discusses damages generally. This is because the Seventh Circuit did not limit itself to requiring juries for any particular kind of damages, but rather broadly asserted that juries are mandated both in actions for compensatory and punitive damages.

Respectfully submitted,

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